(7)

THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 234

JENNINGS A. SNIDER, *Petitioner,*

v.

VIDA RUTH KELLY, THE NATIONAL BANK OF WASHINGTON, EXECUTOR OF THE ESTATE OF JAMES MERRILL KINSELL, DECEASED, RUTH KELLY, MARY JANE KELLY, HILDA F. KELLY AND VIDA CLYDE KELLY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT.

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Washington, D. C.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petition of Jennings A. Snider respectfully shows to this Honorable Court:

STATEMENT OF THE CASE.

On March 10, 1935, respondent Vida Ruth Kelly gave a promissory note in the sum of $8,341.23, payable sixty days after date to Julius Garfinckel & Company, which said note was indorsed to your petitioner and remains unpaid.

On August 16, 1937, Ida J. Kinsell, mother of the respondent Vida Ruth Kelly, and of the decedent, James Merrill Kinsell, departed this life, and, among other things, left real estate at 1608 17th Street, N. W., Washington, D. C., and an undivided one-half interest in this property became vested in the respondent Vida Ruth Kelly.

On February 23, 1938, suit was instituted by your petitioner against the respondent Vida Ruth Kelly on the note above referred to, and, on the same day, the summons and complaint were served on Vida Ruth Kelly and a judgment obtained in these proceedings against the respondent, Vida Ruth Kelly, on the 14th day of November, 1938, in the sum of $8,398.70, with interest from July 10, 1938. On March 1, 1938, the respondent Vida Ruth Kelly voluntarily, and without any consideration, transferred by deed all her right, title and interest in the above described property to her brother, James Merrill Kinsell, it being admitted that she had no other property other than a life interest in herself and her brother, James Merrill Kinsell, in the mother's homestead in Pennsylvania.

At the time of this conveyance to her brother, respondent Vida Ruth Kelly was the only living heir of her brother, who was in bad health (R. 27), but thereafter the decedent, James Merrill Kinsell, made a Will which was typewritten the blank day of May and in which was inserted "June 9, 1938" as the date of the execution of the said Will, by which Will the above described property, together with all the property owned by the decedent, James Merrill Kinsell, was conveyed equally to the four children of the respondent Vida Ruth Kelly, and who have been made parties hereto, in addition to the National Bank of Washington, the Executor of the Estate of James Merrill Kinsell.

On November 28, 1938, a bill of complaint was filed by your petitioner against the respondent Vida Ruth Kelly and James Merrill Kinsell, for the purpose of setting aside the conveyance from Vida Ruth Kelly to James Merrill Kinsell, and to sell the interest of Vida Ruth Kelly in the

above described property, for the purpose of satisfying the judgment obtained against her, and on the 11th day of November, 1940, prior to the trial of this case, James Merrill Kinsell, departed this life, and the parties named above were made parties in his place and stead.

The respondent Vida Ruth Kelly defended on the ground that she had no intention of defrauding this petitioner, and further that she felt that she had no interest in this property, for the reason that her brother, James Merrill Kinsell, in 1907, had loaned his mother the sum of $10,000.00, and she, in turn, had given a mortgage to secure the payment of this note, but that no payment of any kind was ever made on the note, nor was it shown that there had been any written acknowledgment by the debtor, Ida J. Kinsell, and, while a copy of the note was introduced in evidence, over the objection of counsel for the petitioner, no testimony was introduced covering the disposition of the original note, other than that it could not be found. The trustees named in the deed of trust had been dead for years and no action taken on the part of the respondent Vida Ruth Kelly or the decedent for a transfer of this property, until after suit was filed by your petitioner.

All the testimony covering the past proceedings was in the form of hearsay (R. 24-41), with the exception of the statement made by the respondent Vida Ruth Kelly (R. 26), which is as follows:

> "* * * and that she did not make the conveyance to her brother with the intention of hindering, delaying or defrauding Mr. Snider or any other creditor; that she had no such thought."

The District Court dismissed the Bill of Complaint (R. 19) and an appeal taken to the United States Court of Appeals for the District of Columbia, which affirmed the order of the District Court of the United States for the District of Columbia in dismissing the bill of complaint.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the United States Court of Appeals for the District of Columbia is on a question of general importance and is in conflict with its previous decisions and affects property rights.

2. The decision of the United States Court of Appeals for the District of Columbia presents a question relating to the construction of a Statute of the United States.

3. The decision of the United States Court of Appeals for the District of Columbia does not give proper effect to the applicable decisions of this Court.

4. The decision of the United States Court of Appeals for the District of Columbia is in conflict with the decisions of other United States Circuit Courts of Appeals.

QUESTIONS PRESENTED.

1. Whether the United States Court of Appeals for the District of Columbia was in error in affirming the judgment of the District Court of the United States for the District of Columbia, in dismissing the Bill of Complaint and in failing to hold that such conveyance was in violation of Title 12, Section 401 of the District of Columbia Code of 1940, further known as Section 1120 of the Code of the District of Columbia amended to June 7, 1924, and further known as the Act of March 3, 1901, 31 Stat. 1368, Chapter 854, where it is shown that the respondent Vida Ruth Kelly, six days after the filing of suit and service of the complaint upon her, voluntarily and without consideration, conveyed all her interest in property to her brother, James Merrill Kinsell, and without retaining any property or assets for the payment of her creditor, she in addition being his only heir, and which said property was subsequently, by will, conveyed to the four children of the respondent Vida Ruth Kelly.

2. Whether the United States Court of Appeals for the District of Columbia was in error in failing to hold that a voluntary conveyance, without any consideration, by a debtor, with or without fraudulent intent, when such conveyance impairs the means of the grantor to pay her debts, is void as a matter of law as being made to hinder, delay and defraud creditors, in violation of Title 12, Section 401 of the District of Columbia Code of 1940, further known as Section 1120 of the Code of the District of Columbia amended to June 7, 1924, and further known as the Act of March 3, 1901, 31 Stats. 1368, Chapter 854.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8231, "JENNINGS A. SNIDER, APPELLANT, vs. VIDA RUTH KELLY, RUTH KELLY, MARY JANE KELLY, ET ALS., APPELLEES" and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

JENNINGS A. SNIDER, by
CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.,
Washington, D. C.,
Counsel for Petitioner.

THE

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 43) is reported in

II.

JURISDICTION.

1. The opinion of the United States Court of Appeals for the District of Columbia is dated April 26, 1943 (R. 43),

and a petition for re-hearing was filed on May 8, 1943, which said petition was denied May 29, 1943 (R. 45).

2. The United States Court of Appeals for the District of Columbia, in sustaining the judgment of the District Court of the United States for the District of Columbia, by its ruling, ignored its own decisions and applicable decisions of this Court.

3. The United States Court of Appeals for the District of Columbia failed to give a proper interpretation to the Act of Congress enacted March 3, 1901, being 31 Stat. 1368, Chapt. 854, and further known as Title 12, Section 401 of the 1940 Code of the District of Columbia and 1120 of the Code of the District of Columbia amended to June 7, 1924.

4. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "STATEMENT OF THE CASE" in the Petition, and, in the interest of brevity, the statement is not to be repeated at this point.

IV.

SPECIFICATION OF ERRORS.

1. The United States Court of Appeals for the District of Columbia erred in holding that the conveyance by the respondent Vida Ruth Kelly was not made for the purpose of hindering, delaying and defrauding your petitioner, in accordance with Title 12, Section 401 of the District of Columbia Code of 1940, further known as Section 1120 of the Code of the District of Columbia amended to June 7, 1924, and further known as the Act of March 3, 1901, 31 Stat. 1368, Chapter 854.

2. The United States Court of Appeals for the District of Columbia erred in sustaining the action of the United States District Court for the District of Columbia in dismissing the bill of complaint.

3. The United States Court of Appeals for the District of Columbia, in interpreting the aforesaid Act of Congress, erred in failing to give consideration to the decisions of the United States Court of Appeals for the District of Columbia, and this Court, prior to and subsequent to the passage of the Act by Congress.

V.

ARGUMENT.

The United States Court of Appeals for the District of Columbia erred in holding that the conveyance by the respondent Vida Ruth Kelly was not made for the purpose of hindering, delaying and defrauding your petitioner, in accordance with Title 12, Section 401 of the District of Columbia Code of 1940, further known as Section 1120 of the Code of the District of Columbia amended June 7, 1924, and further known as the Act of March 3, 1901, 31 Stat. 1368, Chapter 854.

The record conclusively shows that your petitioner obtained a judgment against respondent Vida Ruth Kelly, on which said judgment execution was issued, and which said execution was returned unsatisfied, and that pending the disposition of that suit the respondent Vida Ruth Kelly, without consideration, transferred to her brother her interest in the property located at 1608 17th Street, N. W., Washington, D. C., and that the present suit is for the purpose of setting aside this conveyance (R. 2-5).

The matter of fraudulent conveyances is partially covered by the Act of Congress enacted March 3, 1901, 31 Stat. 1368, Chapt. 854, further known as Title 12, Section 401 of the 1940 Code of laws for the District of Columbia, and

Section 1120 of the District of Columbia Code amended to 1924, which is as follows:

> "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or rents and profits issuing from the same, or in goods or things in action, and every charge upon the same, and every bond or other evidence of debt given, or judgment or decree suffered, with the intent to hinder, delay, or defraud creditors or other persons having just claims or demands of their lawful suits, damages, or demands, shall be void as against the persons so hindered, delayed, or defrauded: Provided, That nothing herein shall be construed to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor: Provided further, That the question of fraudulent intent shall be deemed a question of fact and not of law. (Mar. 3, 1901, 31 Stat. 1368, ch. 854, § 1120."

This Section of the Code is referred to in a number of cases as Section 1120, which refers to the Code of Laws for the District of Columbia, Amended to June 7, 1924, and this Section was interpreted in a number of cases and it has definitely been decided that it is not necessary for the plaintiff in such a cause to prove actual fraud on the part of the defendant before a conveyance will be set aside.

In *Barber* v. *Wilds*, 33 App. D. C., Page 155, the Court said:

> "The cause having been heard on bill and answers all averments of fact in the answers, so far as they are consistent with the documentary evidence in the cause, must be taken as true; but it by no means follows that, because the defendants have denied any attempt to hinder, delay, or defraud the creditors of Barber, the court is precluded from finding such intent from the facts and circumstances surrounding the transactions of the parties denying such intent.
>
> Section 1120 of the Code (31 Stat. at L. 1368, chap. 854) provides 'that the question of fraudulent intent

shall be deemed a question of fact, and not of law.' In Means v. Dowd, 128 U. S. 273, 32 L. ed. 429, 9 Sup. Ct. Rep. 65, it was held that a similar statute in Indiana 'had not changed the law on the subject, and that the court must, in the first instance, determine upon the legal effect of the written instrument, and, if that be to delay creditors, it must be rejected.'

In construing a similar statute the court, in Thomson v. Crane, 73 Fed. 327, said: 'A voluntary deed is fraudulent by operation of law where the facts and circumstances clearly show that (the rights of) existing creditors are thereby prejudiced, without regard to whether there was any actual or moral fraud in the conveyance.'

To the same effect are: 20 Cyc. Law & Proc. p. 463; Farrow v. Hayes, 51 Md. 505; Hathaway v. Brown, 18 Minn. 414, Gil. 373; Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876; Cunningham v. Freeborn, 11 Wend. 241.

We conclude, therefore that § 1120 was not intended to change, and does not change, the rule that parties shall be held to intend the natural and probable consequencies of their acts. It follows that, if the inevitable consequences of a conveyance are to hinder, delay, or defraud creditors, the court must so hold notwithstanding the denial of such intent by the parties to such conveyance."

and in the case of *Breneman* v. *Herdman,* 35 Apps. D. C. Page 33, the Court said:

"It is next contended that the court erred in finding that Breneman made said deed of September 28th, 1895, with intent to hinder, delay, or defraud his creditors. This assignment is easily disposed of. The record conclusively shows that at the time he made this conveyance he was harassed by creditors, and that the only property he had in the world was the interest which he conveyed to his sister. It will appear, in the consideration of the next assignment of error, that said conveyance was made upon little or no consideration, although purporting to have been made upon a fairly adequate consideration. It is apparent, therefore, that he was not in good faith preferring one creditor over other, as he would have had the right to do. Merillat

v. Hensey, 32 App. D. C. 64. But, on the contrary, the inevitable consequences flowing from his acts were to hinder, delay, or defraud his creditors, within the meaning of sec. 1120 of the Code (31 Stat. at L. 1368, chap. 854). Barber v. Wilds, 33 App. D. C. 150."

It must certainly follow that there could be no clearer case than the instant case where the inevitable consequences of a conveyance of property would be to hinder, delay or defraud a creditor.

In the case of *Parish* v. *Murfree,* 13 Howard, 92, the Court said:

> "Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the Statute. And if a settlement be made, without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void."

In the case of *Adair* v. *Shallenberger,* 119 Fed. (2nd) 1017, the Court, at Page 1020, said:

> " 'Where there is a general denial of fraud or ownership by witnesses, such denial is of little effect, if the facts and circumstances narrated by the witnesses disclose the contrary. For example, if a man swears that he had no intent to defraud his creditors by a conveyance, but the facts testified to by him show that the conveyance was a voluntary conveyance to his wife without consideration, while he was insolvent, or largely indebted, or on the eve of insolvency, such facts so testified to by him will stamp the conveyance as fraudulent, even though he may have had no actual intention to defraud.' "

In *Matthews* v. *Thompson,* 186 Mass. 14, 71 N. E. 93, the Court said:

> "We have been referred to no case in which it is held that such a conveyance is valid against creditors. It is generally, if not universally, held that freedom from moral turpitude, and an innocent and honest in-

> tention to accomplish a good object in the disposition of the property, are not enough to relieve a transaction of this kind from its fraudulent character, in reference to its effect upon the legal rights of creditors."

and again in the same case, the Court said:

> "Again, if at the date of the conveyance the person making it was not in a position actually to pay his creditors, the law would infer that he intended by making the voluntary conveyance to defeat and delay them."

and in the same case, in reference to the opinion of Chief Justice Campbell in *Fellows* v. *Smith*, 40 Mich, 689, it was said:

> " 'Upon the whole case, while we do not think any fraud was intended, yet we think the conveyance is shown to have been without any legal consideration and voluntary.' In Crawford v. Kirksey, 55 Ala. 282, 27 Am. Rep. 704, this language is found in the opinion: 'Such disposition is constructively fraudulent as against the existing debts of the grantor, no matter how innocent or meritorious the motive with which it was made.' "

In *Arthur* v. *Morrow Bros.*, 131 Md. 59, 101 Atl. 777, the Court said:

> "A voluntary conveyance is prima facie invalid as against existing creditors of a grantor who has no sufficient means to pay his debts, independent of that which has been conveyed, without regard to his actual intent or to that of the grantee."

and again in the same case, the Court said:

> "If the necessary effect of a voluntary conveyance is to hinder, delay or defraud creditors, the legal presumption is that it was made for that purpose, even though there was not actual intent to perpetrate a fraud."

The above cited and reported cases clearly sustain the petitioner's contention that the voluntary conveyance by

Vida Ruth Kelly of her interest in the property at 1608 17th St., N. W., without any consideration, actually hindered and delayed the collection of the judgment against her. The fact that her brother was in bad health and very shortly after this conveyance made the only will he had ever made, so far as the testimony is concerned, leaving this property, together with whatever other property he might have, to the children of Vida Ruth Kelly, indicates that there must have been some understanding covering the transfer of this property, for in the event of the death of James Merrill Kinsell, without a will, this property would have vested in Vida Ruth Kelly.

Where conveyance is without consideration, intention of debtor is not material.

The Federal cases, together with numerous well reasoned State decisions, hold that proof of a conveyance without consideration, by one who is indebted, places upon the defendant the burden of showing that at the time of the conveyance that the debtor still retained sufficient funds to pay his debts.

In the case of *Feist* v. *Druckerman*, 70 Fed. (2nd), 333 the Court said.

> "Now, there is a rule of long standing in the New York Courts that a voluntary conveyance made when the grantor is indebted is presumptively fraudulent. We think this means that, if one indebted makes such a transfer, it is presumed, in the absence of some proof to the contrary, that he was then insolvent."

The Court then referred to the case of *Cole* v. *Tyler*, 65 N. Y., 73, and quoted as follows:

> "This presumption * * * is not to be overthrown by mere evidence of good intent or generous impulses or feelings. It must be overcome by circumstances showing on their face that there could have been on bad intent such as that the gift was a reasonable provision, and that the debtor still retained sufficient means to pay

his debts. He can no more delay his creditors by such voluntary conveyance than he can actually defraud them."

In this case the respondent Vida Ruth Kelly did nothing to meet the presumption, and the proof that there was no consideration was clear.

In the case of *McKey,* v. *Roetter,* 114 Fed. (2d), 129, the Court said:

> "Firmly entrenched in our jurisprudence is the rule that the owner of property may at any time give his property to anyone he chooses, so long as he thereby injures no then existing creditors, Bittinger v. Kasten et al., 111 Ill. 260, 264. If, however, its legal effects works a fraud on the rights of a creditor, it will be deemed fraudulent, and such a creditor may impeach the transfer. Moore, Adm'r. v. Wood et al., 100 Ill. 451; Lawson v. Funk, 108 Ill. 502; Patterson v. McKinney, 97 Ill. 41.
>
> But in our case counsel for the defendant insists it was incumbent upon plaintiff to prove a case of an actual intent by defendant to defraud the bankrupt's creditors, or that she knowingly participated in the fraud, and he points to the fact that she had no knowledge that her husband had any debts or that he was a defendant in the stockholders' liability suit. We find no merit in this contention.
>
> In discussing a somewhat similar contention made in Lawson v. Funk, supra, the court at page 507 of 108 Ill. said: 'The authorities clearly establish two distinct grounds upon which conveyances * * * will be deemed fraudulent as against creditors: First, such as are entered into with a fraudulent intent; and second, such as, from the terms of the agreement or the nature of the transaction itself, are deemed so as a mere inference of law, without regard to the motives or actual intentions of the contracting parties. In the first class of cases the fraudulent intent is always a question of fact, to be established by extrinsic proofs. In the latter, the agreement, under the circumstances shown, is deemed fraudulent, although the parties may have acted in the best of faith. * * *. All such contracts and trans-

actions are conclusively presumed, as an inference of law, to be fraudulent, without regard to the real motives or purposes of the parties.' "

In the case of *Gardner* v. *Kirven,* 191 S. E. 814, the Court states as follows:

"Where a conveyance is made without an actual intent to defraud but without consideration, it is said that the conveyance will stand if the grantor reserves a sufficient amount of property to pay his creditors. Penney v. Reid, 166 S. E. 139.

But this means a sufficient amount of property not merely at the time of the transfer, but an amount from which, in the final analysis, the creditors are able to collect their indebtedness in full. The Court in the Reid case said:

'No rule is more clearly imbedded in the law of this state than that a creditor must be just before he is generous. The law will not permit one who is indebted at the time to give his property away, provided such gift proves judicial to the interest of existing creditors. The motive which prompts the donor to make the gift is wholly immaterial, if the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside and the property subjected to the payment of such indebtedness, upon the ground that it would otherwise operate as a legal fraud upon the rights of the creditors, even though it might be perfectly clear that the transaction was free from any case of moral fraud.' "

The foregoing cases indicate that intentional fraud is not necessary to invalidate a conveyance of real estate, and the only fact necessary to be proven is that the debtor conveyed property without consideration without retaining a sufficient amount to pay his just debts.

The United States Court of Appeals, to support its decision, refers to the case of *Lloyd* v. *Fulton,* 91 U. S. 479, (R. 44), but in that case the debtor, at the time he made the conveyance, retained two and a half times the amount of

his indebtedness, and the creditor made no move to enforce the obligation until a number of years thereafter.

The United States Court of Appeals also refers to the case of *Merillat* v. *Hensey*, 221 U. S. 333 (R. 44), which readily discloses a different set of facts, but the Court in that case, in referring to a similar statement of facts, as presented in the instant case, at Page 345, stated as follows:

> "Section 1120 of the District of Columbia Code provides that in suits to set aside transfers or assignments as made with intent to hinder, delay, or defraud creditors, 'the question of fraudulent intent shall be deemed a question of fact and not of law.'
>
> Counsel have argued, as courts have ruled, that no amount of evidence will assign to an instrument an operation which the law does not assign to it. Thus a mere deed or gift which actually deprives existing creditors of property which was subject to their claims, or a transfer of property grossly disproportioned to a debt secured under a conveyance apparently absolute, but subject to a secret agreement that the surplus should be held for the assignor, could not be saved, for the necessary legal effect would be to hinder, delay or defraud creditors, and the law could but assign to such conveyance the intent which must indubitably appear from the facts. Edgell v. Hart, 9 N. Y. 213, 217."

Any right other than that of an heir at law had by James Merrill Kinsell was barred by the Statute of Limitations.

The Court, in its opinion, (R. 44) indicates that the respondent Vida Ruth Kelly was not the owner of this property, but she had a legal right to which your petitioner was entitled, and all the facts surrounding any litigation covering that point was not in issue in this case, for the only matter presented was whether or not the conveyance was made with the intent to hinder, delay or defraud your petitioner. Surely the respondent had some interest, for it was necessary to convey it by deed.

No action of any kind had been taken by James Merrill Kinsell for the enforcement of any right that he might have had under his note or mortgage for more than thirty-four years, and any interest or right that he might have to enforce such rights was barred by the Statute of Limitations, in accordance with Title 12, Section 201 of the 1940 edition of the District of Columbia Code.

If James Merrill Kinsell had intended or desired to enforce his rights under the mortgage it would be necessary that a petition be filed for the appointment of Trustees, at which time any party interested in the property could set up the Statute of limitations.

In *Cropley* v. *Eyster,* 9 Apps. D. C., 378, the Court said:

> "In this proceeding the bar of limitation, or lapse of time, does not apply as in case of an action on the note, but to the remedy for the enforcement of an equitable right in land under the mortgage; hence the same period that would bar an ejectment is required. Peters v. Suter, 2 MacA. 516, 518; Elmendorf v. Taylor, 10 Wheat. 152, 169. However, as more than twenty years elapsed between the maturity of the note and the filing of appellant's petition, the bar is complete unless his right of action shall have been duly kept alive. Whether this has been, so as to let in the appellant's claim to right of participation in the proceeds of the foreclosure sale (a point of special importance to the interest of the second mortgage), depends upon circumstances that will be considered later."

In *Reynolds* v. *Simon Needle et als.,* 132 Fed. (2nd) 161, decided by the United States Court of Appeals for the District of Columbia, on December 14, 1942, the Court, in referring to the statute covering possession of property, stated as follows:

> "The complaint, which was filed August 28, 1941, alleges that "on the first day of March, 1925 * * * the defendants entered * * * and unlawfully ejected the plaintiff * * *." Since the cause of action arose at the time of the ejection, the complaint shows on its face that it arose more than fifteen years before suit. The

statute provides: "No action shall be brought for the recovery of lands, tenements, or hereditaments after fifteen years from the time the right to maintain such action shall have accrued * * *." Appellees were entitled to summary judgment if there was no 'genuine issue as to any material fact.' Affidavits were not required."

THE RECORD CONTAINS NO PROPER EVIDENCE TO SUSTAIN THE FINDINGS OF FACT.

All the testimony introduced by the respondents (R. 24-41) was hearsay and not one word of substantial evidence can be found in the record to substantiate the findings of fact signed by the trial Justice. And the Court acknowledged that it was hearsay and accepted it as such as will appear by the following excerpts taken from the record. The following is taken from page 25 of the record:

"Q. What did you hear your mother say with respect to this note and the property?

Mr. Doherty. I object, if your Honor please. I would say that is absolutely hearsay.

The Court. I am going to admit that, because, after all, as the Court indicated a few minutes ago, if the case were tried before a jury, the evidence would be excluded. But it is on the Equity side, without a jury, and it is to the interest of the Court to find what the facts are. There is a claim here of a note evidencing a debt between this respondent's mother and her brother."

* * * * * * * * *

"The Witness. I would not attempt to quote it. My mother assured me of this note having been given and that that would protect my brother, that the property would automatically be his. I knew that and understood it for a great many years."

On page 33 of the record is the following:

"The Court. The Court heard the witness testify, and he made statements, according to the best of his recollection, allegedly made by Ida Kinsell and by

James Kinsell. Of course that is plainly hearsay. I understand that counsel objects to that.

Mr. Doherty. That is right.

The Court. The Court understands that, and the objection is noted, and the Court will admit it for whatever light it will throw on the matter as a whole—what was said by Mrs. Kinsell to Mr. Laskey and what was said by Mr. Kinsell to Mr. Laskey—in reference to the offer of what purports to be a copy of the original note, counsel having indicated that due diligence was used to secure the original. If counsel desires to offer it in evidence, it is admitted."

In addition to being hearsay, the testimony covered collateral issues brought into the case by the respondents and permitted by the Court and these collateral findings were the basis of all the findings of fact. The only issue presented by the pleadings in the case was whether or not the respondent, Vida Ruth Kelly, had made a conveyance to hinder and delay the collection of the debt due the petitioner, Jennings A. Snider, and the Court permitted all the hearsay and collateral evidence to come in with the observation that he was sitting as a chancellor and for that reason could take the good out of such evidence and disregard any evidence which had not been properly admitted. It is submitted that a trial judge is as human as a jury and that he should not be permitted to entertain improper evidence and to say that he did or did not base his findings on improper evidence.

In the case of *Shepherd* v. *United States*, 290 U. S. 96, 54 S. Ct. 22, the Court at page 104 stated as follows:

"It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some

one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

In the case of *Kovacs* v. *Julia S. K. Szentes,* a case which was recently decided at the June Term of the Supreme Court of Errors of Connecticut, and which has not yet been published, the Court, in reversing the cause and ordering a new trial, stated the following:

"*Maltbie, C. J.* In this action the plaintiff sought to recover damages from the defendant, his mother-in-law, on the ground that she had alienated the affections of his wife. Little purpose would be served by stating the facts found by the trial court, or considering the assignments of error seeking corrections in the finding except in one particular we shall discuss.

While the plaintiff was testifying in his own behalf he was asked certain questions as to statements made to him by his wife not in the presence of the defendant. When the first of these questions was asked, the defendant objected and the matter was discussed at length. The trial court stated that as it was almost at the end of the term it would be unfortunate, with the witnesses present, to have evidence summarily ruled out on debatable grounds, and that counsel could look up the authorities and later be heard on a motion to strike out; and it added: 'It will produce no lasting effect on my mind, because I feel that I can readily dismiss it, if it is stricken from the record.' It admitted 'this particular question.' No exception was taken to this ruling, and the finding does not show that the question was answered, so that in itself the admission of this question presents nothing for our consideration. Reference is made to it only because of its possible bearing upon later rulings of the court. Other similar ques-

tions were thereafter asked, but no motion to strike out any evidence of this nature was made. To the admission of a number of the later questions, no exception appears to have been taken, and in other instances the finding does not show that they were answered, and these, too, we disregard. Others of the questions were admissible; in a suit for alienation of affections, the state of mind of a spouse whose affections are alleged to have been alienated may be material to show the loss of affection which is the gist of the action and to show the effect, in producing that loss, of the claimed words or acts of the defendant; and statements made out of court by him or her relevant to such an inquiry are admissible on that ground, not to prove the truth of any facts included in them. Moir v. Moir, 181 Iowa, 1005, 1008, 165 N. W. 221; Pugsley v. Smyth, 98 Ore. 448, 460, 194 Pac. 686; Cripe v. Cripe, 170 Cal. 91, 93, 148 Pac. 520; 6 Wigmore, Evidence (3 Ed.), 1730; and see Vivian's Appeal, 74 Conn. 257, 261, 50 Atl. 797; Home Banking & Realty Co. v. Baum, 85 Conn. 383, 388, 82 Atl. 970. In one instance, however, the plaintiff testified, over objection and exception, that his wife stated to him that her mother said she would disown her if she returned to him. This question was clearly not admissible within the principle to which we have referred; its effect would be to prove a fact and not to show the mental condition of the plaintiff's wife. Vivian's Appeal, supra. If the basis of the trial court's ruling admitting this question was that stated when the first of this series of questions was asked, this does not obviate the error. A judge has not such control over his mental faculties that he can definitely determine whether or not inadmissible evidence he has heard will affect his mind in making his decision. * * *"

This question was presented to the United States Court of Appeals in the original brief, argument and again on a motion for rehearing but the Court has made no finding or returned any opinion upon this particular point, and it is a point upon which this Court should grant a writ of certiorari in order to render a proper decision in this case and that your petitioner might have his day in Court upon evidence allowed under the ordinary rules of evidence.

CONCLUSION.

It is respectfully submitted that your petitioner, by the record, has made out a clear case that the respondent Vida Ruth Kelly made a conveyance of her interest in all her property to her brother, without any consideration, while indebted to your petitioner, and that she failed to retain sufficient assets with which to pay her obligation to your petitioner, and further it was done under such circumstances which clearly indicated her intent to hinder, delay and defraud your petitioner.

The cases submitted herewith clearly indicate that prior to and subsequent to the passage of the Act of Congress referred to, it was and is the general law, both in this jurisdiction and elsewhere, that where a debtor conveys property, without consideration, without, retaining sufficient funds with which to pay his creditors, that such conveyance is void, regardless of his intent, for the necessary legal effect of such an act would be to hinder, delay or defraud creditors, and the law could but assign to such conveyance the intent which must indubitably appear from the facts.

It is, therefore, respectfully submitted that the United States Court of Appeals for the District of Columbia, has failed to give proper effect to, and its decision in this case is in conflict with, the applicable decisions of its own Court, of this Court, and of the various United States Circuit Courts of Appeals, and the decisions of the higher Courts of the various States, a number of which cases are set forth in this petition, and its decision does not tend to a uniform interpretation of the Act of Congress in question, and that this case is one calling for the exercise by this Court of its supervisory powers, in order that your petitioner may receive a fair and impartial decision and that to such an end of a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

CORNELIUS H. DOHERTY,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 234.

JENNINGS A. SNIDER, *Petitioner*,

v.

VIDA RUTH KELLY, THE NATIONAL BANK OF WASHINGTON, Executor of the Estate of James Merrill Kinsell, Deceased, RUTH KELLY, MARY JANE KELLY, HILDA F. KELLY and VIDA CLYDE KELLY, *Respondents*.

BRIEF OF RESPONDENTS, VIDA RUTH KELLY, THE NATIONAL BANK OF WASHINGTON, EXECUTOR OF THE ESTATE OF JAMES MERRILL KINSELL, DECEASED, RUTH KELLY, MARY JANE KELLY AND HILDA F. KELLY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Cases Cited.

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This brief is filed on behalf of all of the respondents, with the exception of Vida Clyde Kelly, who is an infant represented by a Guardian Ad Litem appointed by the trial court. There is no conflict of interest between the several respondents, who have taken a common position against the petitioner in the courts below. For convenience, the parties are referred to herein as they appeared in the trial court, that is, the petitioner is referred to as plaintiff, and the respondents are referred to as defendants.

STATEMENT OF THE CASE.

On November 19, 1907, Ida J. Kinsell owned certain real estate in the District of Columbia, known as Lot One hundred seventy-three (173) in T. F. Schneider's subdivision of lots in Square One hundred fifty-five (155), improved by a residence known as 1608 Seventeenth Street, Northwest, which was assessed for purposes of taxation at Thirteen thousand eight hundred ninety-nine dollars ($13,899.). (R. 3.) Mrs. Kinsell borrowed Ten thousand dollars ($10,000.) from her son, James Merrill Kinsell, for which she gave to him her note for that amount, dated November 19, 1907, payable to his order five years after date. (R. 34, 35.) To secure the payment of this note, she executed and delivered a deed of trust in the form generally used in the District of Columbia, conveying said property to Malcolm Hufty and Lawrence Hufty, as Trustees. The deed of trust was duly recorded in the Office of the Recorder of Deeds on November 27, 1907, in Liber 3114, folio 427. (R. 35.)

Ida J. Kinsell died August 16, 1937, (R. 26) leaving as her only heirs-at-law one daughter, the defendant, Vida Ruth Kelly, and James Merrill Kinsell, her only son, (R. 24.) She left a will dated September 24, 1934, and a codicil thereto dated January 30, 1935, which were admitted to probate in Indiana County, Pennsylvania, where she maintained her domicile. William Alexander Clementson, Jr., a grandson, duly qualified as Administrator of her estate with the will annexed, and at the date of trial was administering her estate. By her will, the testatrix made elaborate and detailed provisions for the disposition of her property, but no reference was made therein to the home in the District of Columbia. Accordingly, her interest in such property passed by descent to her son and daughter. (R. 35.)

James Merrill Kinsell was a bachelor, and during his mother's lifetime made his home with her. At her request, he made substantial repairs upon the residence property,

paid the taxes at different times, and advanced the money necessary to remodel it for conversion into a guest house. (R. 24, 30, 36.) In view of the loan made to his mother in 1907, and his expenditures upon the property thereafter, his mother, his sister, and the members of her family treated him as if he were in fact the owner of the property. (R. 25, 26, 36, 38.) Mrs. Kelly never had any claim to the property, and knew that since the note was signed in 1907. (R. 26.) In order to assist her brother in getting a clear title, she executed and delivered to him on March 1, 1938, the deed of conveyance which is the subject of attack. (R. 26.)

James Merrill Kinsell died November 11, 1940, leaving a will dated June 9, 1938. The defendant, The National Bank of Washington, was named as Executor and duly qualified as such. (R. 24.) From the date of his death, the property was managed for the Executor by Mrs. Bell Lewis, surviving sister of Ida J. Kinsell, and the aunt of James Merrill Kinsell. (R. 40.) He had been in exclusive possession from the date of his mother's death. (R. 40.)

This suit was brought November 28, 1938. (R. 2.) In addition to Vida Ruth Kelly, James Merrill Kinsell was named as a defendant. Upon his death, there were substituted the devisees under his will, as well as the Executor thereof, and the action was proceeded with against them. (R. 6.)

At the trial, it was conceded that the plaintiff recovered a judgment against the defendant, Vida Ruth Kelly on November 14, 1938, for $8,398.70. It was likewise conceded that by the will of James Merrill Kinsell, his residuary estate was bequeathed and devised unto the defendants, Ruth Kelly, Jane Kelly, Hilda F. Kelly, then a minor but now of age and Vida Clyde Kelly, a minor, four children of the defendant, Vida Ruth Kelly, by her late husband, Clyde Kelly, a former Member of Congress; also that Vida Ruth Kelly executed the conveyance of her interest in the Seventeenth Street property to her brother. No other evidence was offered by the plaintiff in his case in chief. (R. 22-24.)

Vida Ruth Kelly testified as to the reasons for and circumstances of the conveyance. Defendants also offered evidence as to the deed of trust indebtedness upon the property, and the devoted relations between Ida J. Kinsell and her son, as well as the relations between the plaintiff and Mrs. Kelly, particularly her efforts to pay her debt to him. At the conclusion of the evidence, the trial court made findings of fact. (R. 15-19.) Upon such facts, the court concluded as a matter of law that the plaintiff had failed to sustain the allegations of his complaint; that the conveyance made by Vida Ruth Kelly to her brother was not fraudulent; that the same was not made with the purpose and intent of preventing plaintiff from satisfying his judgment against Vida Ruth Kelly, and that accordingly the complaint should be dismissed. A decree in accordance with these conclusions was duly entered. (R. 19, 20.) On appeal the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court, holding that the deed executed by Mrs. Kelly "was of the nature of a quitclaim to clear her brother's title"; that "the acts of the parties were entirely consistent with an honest purpose, and that the conveyance was not in violation of the statute." (R. 43, 44.) A motion for rehearing was denied May 29, 1943. (R. 45.) The opinion is reported in 138 F. (2d) Adv. Op. 817.

Point 1.

Plaintiff says the decision of the United States Court of Appeals for the District of Columbia relates to a question of general importance and is in conflict with prior decisions of that Court. This is denied. At most, there was involved the application of a statute making void any conveyance with the intent to hinder, delay, or defraud creditors. The question is of local, not general, importance. The decisions reached, both by the trial court and the appellate court, are in accord with prior decisions by the Court of Appeals, as

demonstrated by the cases cited in the opinion. Indeed, the cases relied upon by the plaintiff show there is no conflict.

Point 2.

It is contended that because the conveyance was without pecuniary consideration Mrs. Kelly had the burden of proving that she still retained sufficient funds to pay her debts, and in the absence of such proof, the conveyance was fraudulent. The cases cited do not support plaintiff's contention. They involve an essentially different set of facts from the facts in the case at Bar. In each of them, the debtor was being harassed by his creditors and the effect of the conveyance was to dispose of property to which they might otherwise resort for payment. No such situation existed here. Mrs. Kelly's good faith was clearly demonstrated by her attempt to pay three years previously. The trial judge had opportunity to observe her on the witness stand, and found as a fact that her conveyance to her brother "was not made with the purpose and intent of preventing the plaintiff from satisfying his judgment against her." On the contrary, the court found she conveyed "with the intention and purpose of vesting in him (her brother) the whole title to said property without the necessity of any legal proceedings." (R. 19.)

The matter is aptly expressed by the United States Court of Appeals in the opinion, as follows:

> "At best, she had a claim which, in the hands of appellant, might have had some nuisance value as a cloud upon the title. The real owner was James Merrill Kinsell. The deed from his sister to him was of the nature of a quitclaim to clear her brother's title." (R. 44)

Point 3.

Plaintiff asserts that the statute of limitations had run against enforcement of the mortgage held by James Merrill Kinsell; that accordingly, Mrs. Kelly had more than a paper

interest, and her conveyance transferred something of real value. This contention overlooks the fact that when she acquired an interest in the property passing from her mother, the legal title was in the Trustees named in the deed of trust. That legal title is still outstanding, although the trustees are dead. The debt has not been paid. Mrs. Kinsell acknowledged the obligation as a mortgage to one of her business advisors and friends (R. 30), to her daughter, Vida Ruth Kelly (R. 25, 26), and to her sister. (R. 39.) Such admissions preclude any presumption of payment.

> *Brobst' Lessee* v. *Rowe,* 10 Wall. 519, 19 L. ed. 1002.
> *Hughes* v. *Edwards,* 9 Wheat. 489, 6 L. ed. 142-144.

Mrs. Kinsell could have redeemed only upon paying the mortgage debt. This principle is firmly established and is universally recognized.

> *Brobst' Lessee* v. *Rowe, supra.*
> *Hughes* v. *Edwards, supra.*
> 2 Jones on Mortgages, 8th Ed. 879.

The plaintiff is not a purchaser for value. His interest could only be derived through Mrs. Kelly. Her interest was derived from her mother. When her mother's title passed, it was subject to the outstanding mortgage debt. Therefore, any interest Mrs. Kelly acquired was likewise subject to that debt.

It is urged on plaintiff's behalf that any right other than that of an heir-at-law held by James Merrill Kinsell was barred by limitations. The cases cited do not support the contention. Under the law in this District, this defense, if available, and we submit it is not available, could only be interposed by the Administrator of the estate of Ida J. Kinsell. (Title 18, Sec. 515, D. C. Code 1940.) The Administrator testified that he did not intend to avail himself of any such plea, and that he recognized the deed of trust as a

valid obligation of Ida J. Kinsell. (R. 36, 37.) This was a matter which he alone had discretion to determine.

Hanchett v. *Blair,* 100 Fed. 817.
19 Am. & Eng. Enc. L. 184.

Point 4.

While the plaintiff requested no special findings of fact, he contends that the findings of fact made by the trial judge have no legal evidence to support them. The broad claim is confined to certain specified findings. With respect to this contention very little need be said. Finding No. 2 is based upon the uncontradicted testimony of Mrs. Kelly that the home which was conveyed to Garfinckel cost $16,500. (R. 27.) Finding No. 6 is supported by the testimony of four witnesses, viz: John Alden (R. 28-29), John E. Laskey (R. 30, 31), Mabel E. Ashley (R. 34), and Martha Bell Lewis. (R. 39.) Finding No. 8 is supported by the testimony of John Alden (R. 30) and William Alexander Clementson. (R. 36.) Finding No. 9 is supported by the testimony of Martha Bell Lewis. (R. 40.) Finding No. 10 is supported by the testimony of three witnesses, viz.: John E. Laskey (R. 31, 32), John Alden (R. 28), Ralph G. Wilson. (R. 37.) Finding No. 11 is based upon defendant's Exhibit No. 1 (R. 34), and the testimony of John Alden (R. 28, 29, 30), John E. Laskey (R. 30, 31), Mabel E. Ashley (R. 34), Martha Bell Lewis (R. 40), Vida Ruth Kelly. (R. 26.)

Accordingly, the argument that the findings have no legal evidence to support them is without merit. There was positive testimony tending to establish every fact found by the trial court. Moreover, he was in a position to observe and did observe the witnesses by whom it was sought to develop the facts. He reached the conclusion, on the evidence taken before him, that the testimony of these witnesses was reliable, and that they spoke the truth. Such findings, so made, are conclusive on appeal.

Rule 52 Federal Rules of Civil Procedure.
Adamson v. *Gilliland*, 242 U. S. 350, 61 L. ed. 356.
Klimkiewicz v. *Westminster Deposit and Trust Co.*, 74 App. D. C. 333, 122 F. (2) 957.
Wittmayer v. *U. S.*, 118 F. (2) 808.

The Court of Appeals found that "the evidence was ample to support the findings of the court," saying "we find no reason to question their correctness or the correctness of its conclusions that appellant failed to sustain the allegations of his complaint" * * *. (R. 44)

CONCLUSION.

We respectfully submit that there was no fraud in the conveyance complained of. On the contrary, the evidence clearly showed the conveyance was made by a sister to her brother for the purpose of vesting in him the full legal title to his own home, without compelling him to resort to foreclosing the mortgage securing a debt which then exceeded the value of the property. The trial court found nothing in the circumstances to justify holding such a conveyance was fraudulent. It was actuated by perfectly proper considerations. At best, the conveyance transferred a naked paper interest. It did not have the effect and operation of hindering or delaying the plaintiff in the enforcement of his judgment. The findings of the trial court were complete. They were amply supported by the evidence given in open court by witnesses whose testimony was not assailed. The conclusions of law made by the court were the only proper conclusions in view of the evidence.

It was, therefore, proper to affirm the decree of the trial court. The judgment of affirmance was in accord with prior decisions in the District of Columbia, and not in conflict with any applicable decisions of this Court. Accordingly,

we respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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